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17 UNITED STATES DISTRICT COURT  
18 NORTHERN DISTRICT OF CALIFORNIA  
19 SAN FRANCISCO DIVISION

20 DAVID AND NATASHA WIT, et al.,  
21 Plaintiffs,  
22 v.  
23 UNITED BEHAVIORAL HEALTH,  
24 Defendant.

25 Case No. 3:14-CV-02346-JCS  
26 Related Case No. 3:14-CV-05337-JCS

27  
**DEFENDANT'S ADMINISTRATIVE  
MOTION TO FILE UNDER SEAL  
EXHIBITS TO THE CONSOLIDATED  
DECLARATION OF JENNIFER S.  
ROMANO IN SUPPORT OF ITS  
MOTIONS IN LIMINE**

28 Trial Date: October 16, 2017

Judge: Hon. Joseph Spero  
Courtroom: G

DEFENDANT'S ADMINISTRATIVE MOTION TO  
SEAL;  
CASE NOS. 3:14-CV-02346-JCS, 3:14-CV-05337-JCS

1 GARY ALEXANDER, et al.,  
2 Plaintiffs,  
3 v.  
4 UNITED BEHAVIORAL HEALTH,  
5 Defendant.

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

Pursuant to Civil Local Rules 79-5 and 7-11 and the protective order (“Protective Order”) entered by the Court in this action, Defendant United Behavioral Health (“UBH”) hereby moves to file under seal twenty-one exhibits to the Consolidated Declaration Of Jennifer S. Romano In Support Of Defendant UBH’s Motions In Limine (the “Romano Declaration”) and limited portions of UBH’s Motions *in Limine* and Opposition to Plaintiffs’ Motion *in Limine* that reference these exhibits, filed concurrently herewith. Specifically, UBH moves to file the following entirely or partially under seal:

- Exs. 1 through 6, 8, 9, 11 through 17, 19 through 22, and 26 to the Romano Declaration;
  - portions of UBH's Motion *in Limine* No. 1 at page 6 footnote 3;
  - portions of UBH's Motion *in Limine* No. 3 at page 4, lines 10, 13, and 23 and page 5, line 27; and
  - portions of UBH's Opposition to Plaintiffs' Motion *in Limine* No. 2 at page 4 lines 6 through 15, 18 through 21, and 23 through 26.

Compelling reasons exist for filing these documents entirely or partially under seal because each contains at least one of the following: **(i)** sensitive financial information that might harm UBH’s competitive standing if disclosed to the public; **(ii)** confidential business information about UBH’s internal practices that might harm UBH’s competitive standing if disclosed to the public; **(iii)** personal health information (“PHI”) and/or personally identifying identification (“PII”) of members in UBH’s plans; and/or **(iv)** confidential communications subject to the attorney-client privilege, which has not been waived. Pursuant to Civil Local Rules 7-11 and 79-5, this motion is accompanied by the Declarations of Nathaniel P. Bualat (the “Bualat Declaration”) and Adam Easterday (the “Easterday Declaration”).

#### I. Compelling Reasons Exist to File Under Seal UBH's Sensitive Financial Information.

Compelling reasons exist to file under seal Exs. 16, 17, 19 through 22, and 26 as well as the related portions of UBH’s Motion *in Limine* No. 3 because these documents reflect UBH’s sensitive financial information—including UBH’s Per-Member, Per-Month (“PMPM”) rates, rate structures, internal financial projections, and summaries of UBH’s annual profit. If a competitor

1 of UBH's were to obtain information about UBH's PMPM rates or rate structures, the competitor  
 2 could market to UBH's customers or potential customers by using this information to price under  
 3 UBH. Further, UBH's customers or potential customers could use UBH's rates and/or rate  
 4 structure in negotiations to UBH's disadvantage. Finally, UBH's internal financial projections  
 5 reflect UBH's potential future business decisions, which could be used by a UBH competitor to  
 6 interfere with UBH's ability to enact these decisions.

7 Courts in the Ninth Circuit consistently seal "pricing terms" like the ones discussed in  
 8 these documents because such data amounts to a protected trade secret under the compelling  
 9 reasons standard. *See, e.g., In re Elec. Arts, Inc.*, 298 Fed. App'x 568, 569 (9th Cir. 2008)  
 10 (finding that "pricing terms . . . plainly fall[] within the definition of 'trade secrets'" under  
 11 "compelling reasons" standard and thereby warrant a seal order). Courts also seal confidential  
 12 "business information [that] could harm a litigant's competitive standing" because it "could place  
 13 [the litigant] in a diminished bargaining position in future negotiations with potential customers  
 14 and competitors, thereby causing significant harm to [litigant's] competitive standing." *Ovonic*  
 15 *Battery Co., Inc. v. Sanyo Elec. Co., Ltd*, No. 14-CV-01637-JD, 2014 WL 2758756, at \*2 (N.D.  
 16 Cal. June 17, 2014) (internal quotation marks omitted). As set forth in the Easterday Declaration,  
 17 this proprietary financial information is not publicly disclosed and there is a substantial risk that  
 18 UBH would suffer serious competitive harm if it were disclosed to the public. Easterday  
 19 Declaration ¶ 3, 4. *See Declaration Of Heather W. Catlin In Support Of Plaintiffs' Administrative*  
 20 *Motion To File Documents Under Seal*, ECF No. 264-3 (declaration of Heather W. Catlin noting  
 21 that financial information is confidential and could harm UBH if disclosed); *See also Icon-IP Pty*  
 22 *Ltd. v. Specialized Bicycle Components, Inc.*, No. 12-CV-03844-JST, 2015 WL 984121, at \*2  
 23 (N.D. Cal. Mar. 4, 2015) (granting motion to seal under Civ. L.R. 79-5(b) because "pricing,  
 24 profit, and customer usage information, when kept confidential by a company, is appropriately  
 25 sealable under the 'compelling reasons' standard").

26 This Court has previously determined that similar sensitive financial information met the  
 27 standard for sealing, first during the Class Certification hearing (ECF No. 140), and again  
 28 throughout the briefing at the summary judgment phase under the heightened "compelling

1 reasons” standard for sealing (ECF No. 255). This information is also the subject of Plaintiffs’  
 2 pending motions to file certain documents under seal. ECF Nos. 303, 305.

3 **II. Compelling Reasons Exist to File Under Seal UBH’s Business Information.**

4 In the alternative, compelling reasons also exist to file under seal Exs. 16, 17, 19, and 26  
 5 because these documents consist of UBH’s confidential business information, including its  
 6 internal process for reviewing and potentially changing its utilization management process. As set  
 7 forth in the Easterday Declaration, this information is not publicly disclosed and could harm  
 8 UBH’s competitive standing if disclosed to the public. Easterday Declaration ¶ 6, 7. *See*  
 9 Declaration Of Lorenzo Triana In Support Of Plaintiffs’ Administrative Motion To File  
 10 Documents Under Seal, ECF No. 264-2 (declaration of Lorenzo Triana noting competitive  
 11 sensitivity of similar information relating to the same internal process). For example, if one of  
 12 UBH’s competitors were to obtain this information, it could determine UBH’s internal review  
 13 process and reporting and analytic capabilities and structure, which are market differentiators for  
 14 UBH. *See Opperman v. Path, Inc.*, No. 13-CV-00453-JST, 2017 WL 1036652, at \*4 (N.D. Cal.  
 15 Mar. 17, 2017) (granting motion to seal under Civ. L.R. 79-5(b) for email exchanges that  
 16 contained “sensitive information about Apple’s internal review process” under “compelling  
 17 reasons” standard). Accordingly, there are compelling reasons to seal each of those documents in  
 18 their entirety pursuant to Civil Local Rule 79-5(b).

19 Further, this Court has already granted UBH’s motion to file under seal similar documents  
 20 relating to the same internal process under the same compelling reasons standard in UBH’s  
 21 opening motion for summary judgment. ECF No. 268.

22 **II. Compelling Reasons Exist to File Under Seal PHI and PII.**

23 There are compelling reasons to file under seal Exs. 1 through 6, 8, 9, and 11 through 14  
 24 and the related portions of UBH’s Motion *in Limine* No. 1 and UBH’s Opposition to Plaintiffs’  
 25 Motion *in Limine* No. 2 because these documents reflect information about Plaintiffs’ medical  
 26 and mental health as well as substance use disorders. Sealing is warranted even though the case  
 27 notes for members of the *Wit* and *Alexander* denial samples have been anonymized and the  
 28 named plaintiffs have made some information public, due to the risk that this sensitive health

1 information could be misused. As the Bualat Declaration discusses in greater depth, these  
 2 documents contain information regarding the types of services sought, diagnoses at issue, dates of  
 3 denials, relevant jurisdictions, and relevant health plans. Bualat Declaration ¶ 4–15.

4 Disclosure of the type of information described above would harm the individuals to  
 5 whom the information pertains, as reflected by the safeguards contained in the Privacy Rules of  
 6 the Health Insurance Portability and Accountability Act (“HIPAA”), codified at 45 C.F.R. Parts  
 7 160 and 164. For example, if this highly personal information is not sealed, members of the  
 8 public—including potential employers—would be able to access and use the information against  
 9 the Plaintiffs in question by disseminating it to associates of those individuals. Such harm  
 10 outweighs the public policies favoring disclosure. Courts in the Ninth Circuits “recognize the  
 11 important public and private interests in protecting medical records from wholesale public  
 12 disclosure.” *See Fischer v. City of Portland*, No. CV 02-1728, 2003 WL 23537981, at \*3 (D. Or.  
 13 Aug. 22, 2003). *See also A.C. v. City of Santa Clara*, No. 13-CV-03276-HSG, 2015 WL  
 14 4076364, at \*2 (N.D. Cal. July 2, 2015) (sealing medical records attached to motion for summary  
 15 judgment under the “compelling reasons” standard); *San Ramon Reg’l Med. Ctr., Inc. v. Principal*  
 16 *Life Ins. Co.*, No. 10-cv-02258-SBA, 2011 WL 89931, at \*1 n.1 (N.D. Cal. Jan. 10, 2011)  
 17 (sealing *sua sponte* medical records attached to motion to dismiss).

18 **III. Compelling Reasons Exist to File Under Seal Attorney-Client Communications.**

19 Finally, compelling reasons exist to file Exs. 15 and 19 under seal because they reflect the  
 20 legal advice of UBH’s in-house attorneys, including Adam Easterday, Esq. Indeed, each exhibit  
 21 contains emails or quotes of emails in which Mr. Easterday provides legal advice. The entirety of  
 22 each exhibit is privileged because, as the exhibits and Mr. Easterday’s declaration demonstrate,  
 23 he also gave legal advice at various meetings which is reflected in the comments of the non-  
 24 attorneys. Easterday Declaration ¶ 8; Bualat Declaration ¶ 16. In the rare case that a party files  
 25 privileged documents without waiving the privilege, the documents should be filed under seal.  
 26 *See Salcido v. Chappell*, No. 09-00586 MMC, 2012 WL 6126368, at \*1 (N.D. Cal. Dec. 10,  
 27 2012) (granting motion to seal portions of petition for writ of habeas corpus to “protect privileged

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1 attorney-client communications and work product information disclosed in his Petition and in any  
 2 further litigation of his claims").

3 UBH did not waive privilege over this document by producing it to Plaintiffs in this case.  
 4 As this Court held, "when counsel is advising an ERISA trustee about plan administration, this  
 5 advice is generally for the benefit of the plan members." ECF No. 118. *See also Stephan v. Unum*  
*6 Life Ins. Co. of America*, 697 F.3d 917, 931 (9th Cir. 2012) (under the fiduciary exception, the  
 7 "plan beneficiary . . . is the 'real client'" of the legal advice relating to plan administration).  
 8 Accordingly, UBH's disclosure of privileged information to Plaintiffs did not constitute a waiver  
 9 of any privilege because Plaintiffs, as beneficiaries of that legal advice, fall within the scope of  
 10 the privilege itself. *Wsol v. Fiduciary Mgmt. Assocs., Inc.*, No. 99 C 1719, 1999 WL 1129100, at  
 11 \*4 (N.D. Ill. Dec. 7, 1999) ("because the fiduciary exception provides that attorney-trustee  
 12 communications regarding fund management are not privileged as against a fund beneficiary,  
 13 disclosure to the beneficiary cannot waive the privilege"). Because the communications reflected  
 14 in exhibit number 15 remain privileged, compelling reasons exist to file this exhibit under seal.  
 15 *Guidiville Rancheria of California v. United States*, No. 12-CV-1326 YGR, 2013 WL 6571945,  
 16 at \*9 (N.D. Cal. Dec. 13, 2013) ("[T]he attorney-client privilege . . . establishes compelling  
 17 reasons for sealing [a document] from the public record").

18 **II. Conclusion**

19 For the reasons set forth above and in the Bualat and Easterday Declarations, filed  
 20 concurrently herewith, UBH requests that this Court grant UBH's Administrative Motion to Seal.  
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22 Dated: September 15, 2017

CROWELL & MORING, LLP

23  
 24 /s/ Nathaniel Bualat  
 25 Jennifer S. Romano  
 Jeffrey H. Rutherford  
 April N. Ross  
 Nathaniel P. Bualat  
 Attorneys for Defendant  
 26 United Behavioral Health  
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